

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1898-CR

Cir. Ct. No. 2012CT2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. KRAHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

¶1 REILLY, J.¹ James A. Krahn appeals his conviction for second-offense operating a motor vehicle while intoxicated on the grounds that it violated

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

his constitutional right to not be tried twice for the same crime. We affirm his conviction as a previous conviction as a first-time offender was void for want of subject-matter jurisdiction, and therefore, his conviction as a second-time offender did not violate his constitutional right.

¶2 Krahn was arrested on September 24, 2011, and was subsequently charged with first-offense operating a motor vehicle while intoxicated and operating with a prohibited blood concentration (OWI). At the time of this arrest, Krahn was awaiting trial in Plymouth municipal court for first-offense OWI as the result of an arrest on August 21, 2011. Krahn pled guilty and was convicted in the Plymouth case on October 11, 2011. On November 2, 2011, Krahn appeared in Sheboygan County Circuit Court for the September 24, 2011 incident and again pled guilty to first-offense OWI. Following this second conviction for first-offense OWI, the Sheboygan county district attorney's office successfully moved the circuit court to reopen the case and vacate the conviction. Krahn was then charged in this action with second-offense OWI as a result of the September 24, 2011 arrest.

¶3 Krahn moved the court to dismiss the second-offense OWI charges on the grounds that the constitutional bar against double jeopardy prevented the district attorney from charging him with second-offense OWI when he had been convicted of first-offense OWI for the same incident. The court rejected Krahn's motion, finding that the previous circuit court lacked jurisdiction to convict Krahn for first-offense OWI. Krahn subsequently pled guilty to second-offense OWI as a result of the September 24, 2011 arrest. Krahn appeals.

¶4 The United States and Wisconsin Constitutions forbid placing persons "twice in jeopardy of punishment" for the same offense (i.e., "double

jeopardy”). *State v. Henning*, 2004 WI 89, ¶16, 273 Wis. 2d 352, 681 N.W.2d 871. “The Double Jeopardy Clause does not necessarily act as a bar to a second trial for the same charge after conviction.” *Id.*, ¶19. We independently review whether a retrial constitutes double jeopardy. *Id.*, ¶14.

¶5 Krahn argues that as he already had been convicted in circuit court of first-offense OWI, which includes the same elements as second-offense OWI, his second-offense conviction constitutes double jeopardy under *Blockburger v. United States*, 284 U.S. 299 (1932). Krahn’s position ignores well-settled precedent.

¶6 Wisconsin trial courts have no subject-matter jurisdiction over second or subsequent drunk driving offenses tried as first offenses contrary to WIS. STAT. §§ 343.307 and 346.65(2)(am). See *Walworth Cnty. v. Rohner*, 108 Wis. 2d 713, 721-22, 324 N.W.2d 682 (1982). The orders and judgments of a court acting in excess of its jurisdiction are void and may be expunged by a court at any time. *State v. Banks*, 105 Wis. 2d 32, 43, 313 N.W.2d 67 (1981). Thus, any proceeding that tries a second-time OWI offender as a first-time offender contrary to the mandatory language of the drunk driving statutes is invalid and no jeopardy attaches to the resulting conviction. See *Rohner*, 108 Wis. 2d at 722. Krahn was properly convicted of second-offense OWI.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

